

MAR 19 1992



3/19/92
UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
1335 East-West Highway
Silver Spring, MO 20910
THE DIRECTOR

MEMORANDUM FOR: Regional Directors

FROM:

(for) William W. Fox, Jr. *Michael F. Gillman*

SUBJECT:

Guidance on Designating Critical Habitat

This memorandum and the attached outline for a Federal Register proposed critical habitat rule provide background and establish guidance for designating critical habitat. Although variation from this guidance may be appropriate in certain situations, the specific requirements of the Endangered Species Act (ESA) and other applicable laws must be satisfied.

The most confusing aspect of designating critical habitat has been determining the direct economic and environmental impacts of a designation. Through NMFS' interpretation of the critical habitat provisions, the direct impacts resulting from a designation, over and **above** the impacts of listing the species, in most cases are minimal. In general, the designation of critical habitat **only** duplicates and reinforces the substantive protections resulting from listing. However, an analysis 'of the' economic, environmental and other impacts is required and our conclusions must be documented. This can be accomplished through a combined environmental/economic impact assessment. This document would also provide the necessary 'background required by the ESA, such as an evaluation of activities that may affect the essential habitat areas (even if these activities would not be directly affected by a designation).

Process

The following summarizes the recommended process for designating critical habitat. As used in this document and the attached outline, "essential habitat" is based solely, on the biological needs of the species, whereas "critical habitat" is that which meets the criteria for designation under the ESA (including need for special management and economic considerations).

1. Identify essential habitat areas. Evaluate the known habitat requirements based on the biological needs of the species. Identify all areas that are essential to the conservation of the species and describe the essential physical and biological features (i.e., identify what makes the habitat important). Essential features should be described in general terms (i.e., adequate flow of oxygenated water, sufficient food resources), rather than specific standards (e.g., specific pH levels).

THE ASSISTANT ADMINISTRATOR
FOR FISHERIES



2. Evaluate the need for special management considerations or protection. Evaluate the need for special management in the areas identified as essential, relating it to the essential features described above. If an area is essential, it is reasonable to presume that it may require special consideration, either now or in the future. At a minimum, activities in the area would need to be monitored. The need for special management can be documented through past actions (e.g., buffer zones and fishery management measures).

3. Prepare a combined environmental/economic impact assessment. At a minimum, two alternatives should be evaluated--the proposed designation and no designation. In some cases, there may be alternative areas that would provide for the conservation of the species, which should be identified and evaluated. The activities (whether public or private) that may affect the alternative areas (even if there would be no additional restrictions placed on these activities due to a critical habitat designation). (See "Framework for Analysis" section of the monk seal critical habitat FEIS). Then, for each alternative, the environmental, economic; and other impacts specifically resulting from a critical habitat **designation** should be described. If a broader economic analysis that considers impacts of the listing or of different recovery scenarios is done, it should be done separately; the environmental/economic impact assessment should focus on the impacts attributable to the proposed critical habitat designation.

4. Publish the **proposed critical habitat designation** in the Federal Register. The recommended format and content of a proposed rule is attached. The critical habitat proposal should not provide specific standards (such as minimum temperature **requirements**) or restrictions (such as prohibitions on vessel traffic). If these types of measures are needed, they should be required in a separate, special rule (i.e., buffer zones established for Steller sea lions), rather than as part of a critical habitat designation. This is because critical habitat provisions apply only to Federal agencies, while special rules would apply to all individuals and entities subject to U.S. jurisdiction.

For species not yet proposed or listed, the critical habitat proposal should be published concurrently with the proposal to list the species. For petitioned listings, this would require completion of the status review and listing/critical habitat package at least 30 days earlier to allow for OMB review of the critical habitat proposal.

5. Publish the final critical habitat designation. The final designation should summarize and respond to comments on the proposal and assessment, and should be published within one year of the proposal unless an extension is justified based on substantial disagreement among scientists (see 5424.17).

If you have any questions concerning this guidance, please contact Pat Montanio, F/PR2, FTS/933-2322.

Attachments

DRAFT: February 18, 1991

Billing Code: 3510-22

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 226

[Docket No.

RIN 0648-[????]

Designated Critical Habitat: [XYZ Species]

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce-

ACTION: Proposed rule.

SUMMARY: NMFS proposes to designate critical habitat for the [XYZ Species (Genus species)] pursuant to the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 et seq. The habitat proposed for designation is [summarize area(s) proposed]. In addition, the proposed designation identifies those physical and biological features of the habitat that are essential to the conservation of the species and that may require special management consideration or protection. The direct economic and other impacts resulting from this critical habitat designation are expected to be minimal. The designation of critical habitat provides explicit notice to Federal agencies and the public that these areas and features are vital to the conservation of the species.

DATES: Comments must be received on or before [insert date 60 days after date of publication in the Federal Register]. Requests for a public hearing must be received on or before [insert date 45 days after date of publication in the Federal Register].

ADDRESSES: Comments and requests for a public hearing should be addressed to the Office of Protected Resources, F/PR2, NMFS, 1335 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: [Include regional and headquarters contacts.]

SUPPLEMENTARY INFORMATION

Background

[This section should provide general background on listing; ESA requirement for designation of critical habitat; previous FR notices on critical habitat; petitions received for critical habitat; and, recommendations or comments received **regarding** critical habitat. If we have received information/comment in response to previous **FR** notice, state that we received such and the pertinent information has been considered and incorporated into this proposal. Be brief; the basis for the proposed designation should **be** described in sections that follow, not here.]

Definition of Critical Habitat

Critical habitat is defined in section 3(5) of the ESA as "(i) the specific areas within the geographical area occupied by the species ... on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection: and (ii) specific areas outside the geographical area occupied by the species ... upon a determination by the Secretary that such areas are essential for the conservation of the species." Areas outside the current range of a species can only be designated if a **designation** limited to the species' present distribution would be inadequate to ensure the conservation of the species. The term conservation, as defined in section 3(3) of the- ESA, means "... to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary."

The criteria to be considered in designating critical habitat are specified under 50 CFR 424.12. NMFS must consider the requirements of the species, including: (1) Space for individual and population growth, and for normal behavior; (2) food, water, air, light, minerals, or other nutritional **or** physiological requirements: (3) cover or shelter: (4) sites for

Definition of Critical Habitat

Critical habitat is defined in section 3(5) of the ESA as "(i) the specific areas within the geographical area occupied by the species ... on which are found those physical or biological features (I) essential to the conservation of the species and (11) which may require special management considerations or protection: and (ii) specific areas outside the geographical area occupied by the species ... upon a determination by the Secretary that such areas are essential for the conservation of the species." Areas outside the current range of a species can only be designated if a **designation** limited to the species' present distribution would be inadequate to ensure the conservation of the species. The term conservation, as defined in section 3(3) of the ESA, means " . . . to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary."

The criteria to be considered in **designating critical** habitat are specified under 50 CFR 424.12. **NMFS** must consider the requirements of the species, including: (1) Space for individual and population growth, and for normal behavior; (2) food, water, air, light, minerals, or other nutritional or physiological requirements: (3) cover or shelter: (4) **sites for**

management or recovery action. A critical habitat designation contributes to species conservation primarily by identifying critically important areas and describing the features within the areas that are essential to the species, thus alerting public and private entities to the importance of the area. Under the ESA, the only direct impact of a critical habitat designation is through the provisions of section 7. Section 7 applies only to actions with Federal involvement, and does not affect strictly state or private activities.

Under the section 7 provisions, a designation of critical habitat would require Federal agencies to ensure that any action they authorize, fund or carry out is not likely to destroy or adversely modify the designated **critical habitat**. Activities that adversely modify **critical habitat** are defined as those actions that "appreciably diminish the value of critical habitat for both the survival and recovery" of the species (50 CFR 402.02). Regardless of a critical habitat designation, Federal agencies must ensure that their actions are not likely to jeopardize the continued existence of the listed species. Activities that jeopardize a species are defined as those **actions** that "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery" of the species (50 CFR 402.02). Using these definitions, activities that destroy or adversely modify critical habitat also are likely to jeopardize the species. Therefore, the protections provided by a critical habitat designation

management or recovery action. A critical habitat designation contributes to species conservation primarily by identifying critically important areas and describing the features within the areas that are essential to the species, thus alerting public and private entities to the importance of the area. Under the ESA, the only direct impact of a critical habitat designation is through the provisions of section 7. Section 7 applies only to actions with Federal **involvement, and does not affect** strictly state or private activities.

Under the section 7 provisions, a designation of critical habitat would require Federal agencies to ensure that any action **they authorize, fund or carry out** is not likely to destroy or adversely modify the designated **critical habitat**. Activities that adversely modify **critical habitat** are defined as **those** actions that "appreciably diminish the value of critical habitat for both the survival and **recovery**" of the **species** (50 CFR 402.02). Regardless of a critical habitat designation, Federal agencies must ensure that their actions **are not** likely to jeopardize the continued existence of the listed species. Activities that jeopardize a species are defined **as** those actions that "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery" of the species (50 CFR 402.02). Using these definitions, activities that destroy or adversely modify critical habitat also are likely to jeopardize the species. Therefore, the **protections provided** by a critical habitat designation

usually only duplicate the protections provided under the section 7 jeopardy provision. Critical habitat may provide additional benefits to a species in cases where areas outside of the species' current range have been designated. In these cases, it is expected that Federal agencies would consult on additional actions occurring in these areas.

A designation of critical habitat provides a clearer indication to Federal agencies as to when consultation under section 7 is required, particularly in cases where the action would not result in direct mortality or injury to individuals of a listed species (e.g., an action occurring within the critical area when a migratory species is not present). The critical habitat designation, describing the essential features of the habitat, also assists in determining which activities conducted outside the designated area are subject to section 7 (i.e., activities that may affect essential features of the designated area). For example, diversions of water upstream from a critical habitat area may affect the essential features of the designated habitat (water flow) and would be subject to the provisions of section 7.

A critical habitat designation would also assist Federal agencies in planning future actions, since the designation establishes, in advance, those habitats that will be given special consideration in section 7 consultations. This is particularly true in cases where there are alternative areas that would provide for the conservation of the species. With a

designation of critical habitat, potential conflicts between projects and endangered or threatened species can be identified and possibly avoided early in the agency's planning process.

Another indirect benefit of critical habitat is that it helps focus Federal, state and private conservation and management efforts in those areas. Recovery efforts may address special considerations needed in critical habitat areas, including conservation regulations to restrict private as well as Federal activities. The economic and other impacts of these actions would be considered at the time of proposal, and, therefore, are not considered in the critical habitat designation process. Other Federal, state and local laws or regulations; such as zoning or wetlands protection., may also provide special protections for critical habitat areas.

Process for Designating Critical Habitat

In summary, developing a proposed critical habitat designation involves three main considerations. First, the biological needs of the species are evaluated and essential habitat areas and features identified. If there are alternative areas that would provide for the conservation of the species, these alternatives are also identified. Second, the need for special management considerations or protection of the area(s) or features is evaluated. Finally, the probable economic and other impacts of designating these essential areas as "critical

habitat" are evaluated. After considering the requirements of the species, the need for special management, and the impacts of the designation, the proposed critical habitat is published in the Federal Register for comment. The final critical habitat designation, considering comments on the proposal and impacts assessment, is published within 1 year of the proposal. Final critical habitat designations may be revised, using the same process, as new data become available.

A description of the essential habitat, need for special management, and impacts of designating as critical habitat, as well as the proposed action, are described in the following sections for the [XYZ Species]..

Essential Habitat of the [XYZ Species]

[This **section** should evaluate the known habitat requirements-. based **on the** biological needs of the species. Identify **all areas** that are **essential to the conservation of the species and describe the essential physical and biological features (i.e. identify what makes the habitat important).** Essential features should be described in general terms (i.e., adequate flow of oxygenated water, sufficient food resources), rather than specific standards (i.e., specific **pH** level). **Basic** biological information should be referenced, such as **the status review or recovery plan, and should not be repeated here.]**

Need for Special Management Considerations or Protection

[This section should describe what type of special management or protection may be needed in the areas identified as essential: it should relate to the essential features described above. If an area is essential, it is reasonable to presume that it may require special consideration, either now or in the future. At a minimum, activities in the area would need to be monitored. The need for special management can be documented through past actions also, such as buffer zones and fishery management measures to protect **steller** sea lions.]

Activities that May Affect the 'Essential Habitat

[This section should describe and evaluate all activities (whether public or private) that may affect the area **identified** as essential (even if there would be no additional restrictions placed on these activities due to a critical habitat designation). It should also identify the Federal agencies that may be affected by designating the area critical habitat.]

Expected Impacts of Designating as Critical Habitat

[This section should reference and briefly summarize the conclusions of the environmental/economic impact assessment prepared. Refer to the assessments for more detail. If multiple

alternatives were considered, explain the basis for proposed action. If areas are excluded based on impacts assessment, explain the basis for exclusion. If a broader economic impact analysis was conducted, this can be described also, but should not be attributed to the critical habitat proposal--the impacts from listing and those from a critical habitat designation should be clearly distinguished.]

Proposed Critical Habitat: Essential Features

[This section should describe the areas proposed for designation as, critical, and briefly describe the essential features: as above, essential features. should be described in general terms, i.e., adequate flow of oxygenated water, sufficient food resources, etc.]

Public Comments Solicited

NMFS is soliciting information, comments or recommendations on any aspect of this proposal from all interested parties. NMFS will consider all information, comments and recommendations received before reaching a final decision. The ESA also provides for a public hearing on this proposal, if requested. Hearing requests must be made in writing and received within 45 days (see DATES and ADDRESSES).

Classification

The Assistant Administrator for Fisheries, NOAA (Assistant Administrator), has determined that this is not a "major rule" requiring a regulatory impact analysis under E.O. 12291. The regulations are not likely to result in (1) an annual effect on the economy of \$100 million or more: (2) a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or geographic regions: or (3) a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The General Counsel of the Department of Commerce has certified that the proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities as described in the Regulatory Flexibility Act; therefore, a regulatory flexibility analysis is not required.

This rule does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act of 1980.

This proposed rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under E.O. 12612.

The Assistant Administrator has determined that the proposed designation is consistent to the maximum extent practicable with the approved Coastal Zone Management Programs of the states of

[list applicable states]. This determination has been submitted for review by the responsible state agencies under section 3.7 of the Coastal Zone Management Act.

NOAA Administrative Order 216-6 states that critical habitat designations under the ESA, generally, are categorically excluded from the requirement to prepare an environmental assessment or an environmental impact statement. However, in order to more clearly evaluate the minimal impacts of the proposed critical habitat designation, NMFS has prepared an environmental assessment (EA). Copies of the EA are available on request (see FOR FURTHER INFORMATION CONTACT).

List of Subjects in 50 CFR Part.226

Endangered and threatened wildlife.

Date:

.

For the reasons set forth in the preamble, 50 CFR part 226 is proposed to be amended as follows:

PART 226--DESIGNATED CRITICAL HABITAT

1. The authority citation for part 226 continues to read as follows:

Authority: 16 U.S.C. 1533.

2. A new section 226.[??] is added to subpart [??] to read as follows:

§226.[??] [XYZ Species].

[Describe the specific boundaries of critical habitat using reference points and lines found on standard maps (see §424.12(c)); reference states, counties, and local jurisdictions, if applicable; maps can be published in Federal Register or a note should be added that maps are available on request. The essential features of the particular habitat can also be listed in general terms.]